

TCEQ DOCKET NO. 2021-1560-DIS

APPLICATION FOR THE CREATION	§	BEFORE THE TEXAS
OF ELLIS COUNTY MUNICIPAL	§	COMMISSION ON
UTILITY DISTRICT FM 984	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality files this Response to Hearing Request on the petition by Ricky Johnston as the managing member of Waxahachie Creek Ranch, LLC for the creation of Ellis County Municipal Utility District FM 984. ED staff has prepared a map showing the location of the proposed district boundary. The map is attached as Attachment A.

I. RECOMMENDATION

The Executive Director respectfully recommends that the Commission grant the hearing requests of the City of Ennis and Ellis County.

II. INTRODUCTION

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Requests on the petition by Ricky Johnston as the managing member of Waxahachie Creek Ranch, LLC (Petitioner) for the creation of Ellis County Municipal Utility District FM 984 (District).

The proposed District will contain approximately 530.5733 acres located within Ellis County, Texas, and wholly within the extraterritorial jurisdiction (ETC) of the City of Ennis, Texas. The proposed District will be located along the north side of Farm-to-Market Road (FM) Highway 984 at Getzendaner Road, west of the Burlington Northern Santa Fe Rail line in the extraterritorial jurisdiction of the City of Ennis in Ellis County, Texas.

The Petition states that the general nature of the work to be done by the District to: (1) purchase, construct, acquire, improve, or extend inside or outside of its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, and commercial purposes; (2) collect, transport, process, dispose of and

control domestic, and commercial wastes; (3) gather, conduct, divert, abate, amend and control local storm water or other local harmful excesses of water in the District; (4) design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads and turnpikes, or improvements in aid of those roads; (5) purchase, construct, acquire, improve, or extend inside or outside of its boundaries such additional facilities, systems, plants, and enterprises as shall be consonant with the purposes for which the proposed District is created.

III. PROCEDURAL HISTORY

The Petitioner filed an application for the creation of the District on February 2, 2021, and the application was declared administratively complete on February 10, 2021. The Petitioner published the Notice of District Petition in *The Ennis News*, a newspaper generally circulated in Ellis County, where the District is proposed to be located, on July 25, 2021 and August 1, 2021. Proper notice of the application was posted on the bulletin board used for posting legal notices in the Ellis County Courthouse on July 23, 2021. The period to request a contested case hearing ended on August 31, 2021.

The Office of the Chief Clerk sent notice of the agenda setting for the Commission's consideration of the hearing request on July 21, 2021.

IV. CREATION OF MUNICIPAL UTILITY DISTRICTS

A. District Purpose

A municipal utility district (MUD) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution. TEX. WATER CODE § 54.011. The District in this case is proposed to be created and organized according to the terms and provisions of Article XVI, Section 59, of the Texas Constitution and Chapters 49 and 54 of the Texas Water Code.

A MUD may be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;

- (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
- (4) the conservation and development of its forests, water, and hydroelectric power;
- (5) the navigation of its inland and coastal water;
- (6) the control, abatement, and change of any shortage or harmful excess of water;
- (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (8) the preservation of all natural resources of the state.

TEX. WATER CODE § 54.012. The Commission has jurisdiction to hear this case and create the District. TEX. WATER CODE § 54.014.

B. Required Findings

The Commission must grant or deny a MUD creation application in accordance with TEX. WATER CODE § 54.021. In order to grant an application, the Commission must find that organization of the district as requested is feasible and practicable and is necessary and would be a benefit to the land to be included in the district. TEX. WATER CODE § 54.021(a); 30 TEX. ADMIN. CODE § 293.13(b)(1). If the Commission fails to make these findings, it shall refuse to grant the petition. TEX. WATER CODE § 54.021(d); 30 TEX. ADMIN. CODE § 293.13(a).

In determining if a project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the Commission shall consider:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:

- (A) land elevation;
- (B) subsidence;
- (C) groundwater level within the region;
- (D) recharge capability of a groundwater source;
- (E) natural run-off rates and drainage;
- (F) water quality; and
- (G) total tax assessments on all land located within a district.

TEX. WATER CODE § 54.021(b).

The Commission, however, must exclude the areas that it finds would not be benefited by the creation of the district and must redefine the boundaries of the proposed district according to its findings. 30 TEX. ADMIN. CODE § 293.13(b)(2); TEX. WATER CODE § 54.021(c).

C. City Consent

TCEQ regulations require all district creation applications to contain “a certified copy of the action of the governing body of any municipality in whose extraterritorial jurisdiction the proposed district is located, consenting to the creation of the proposed district, under Local Government Code, § 42.042.” 30 TEX. ADMIN. CODE § 293.11(a)(2). Commission Rules further state that “[i]f the governing body of any such municipality fails or refuses to grant consent, the petitioners must show that the provisions of Local Government Code, § 42.042, have been followed.” *Id.*

MUDs are also subject to the city consent requirements of TEX. WATER CODE § 54.016, which states that “[n]o land within the corporate limits of a city or within the extraterritorial jurisdiction of a city, shall be included in a district unless the city grants its written consent, by resolution or ordinance, to the inclusion of the land within the district in accordance with Section 42.042, Local Government Code, and this section.” TEX. WATER CODE 54.016(a); LOC. GOVT. CODE § 42.042(a). If the city fails or refuses to give consent within 90 days after receipt of a written request, the land owners in the area “may petition the governing body of the city and request the city to make available to the land the water or sanitary sewer service contemplated to be provided by the district.” TEX. WATER CODE § 54.016(b); LOC. GOVT. CODE, § 42.042(b). If

the landowners and the city then fail to execute a “mutually agreeable contract” for the provisions of the requested services within 120 days after receipt of the petition, “the failure shall constitute authorization for the inclusion of the land in the district under the provisions of this section.” TEX. WATER CODE § 54.016(c); LOC. GOVT. CODE § 42.042(c). The Texas Water Code goes on to state that:

If the city fails or refuses to grant permission for the inclusion of land in a district or to execute a mutually agreeable contract providing for the water or sanitary sewer service requested within the time limits contained within Subsection (b) or (c) of this section, the applicant may petition the commission for creation of the district or inclusion of the land in a district. The commission shall allow creation or inclusion of the land in a proposed district upon a finding that the city either does not have the reasonable ability to serve or has failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to serve the proposed development at a reasonable cost to the landowner. The commitment shall provide that construction of the facilities necessary to serve the land shall be commenced within two years, and shall be substantially complete within four and one-half years from the date the petition was filed with the city.

TEX. WATER CODE § 54.016(d).

V. EVALUATION PROCESS FOR HEARING REQUESTS

As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, Sections 55.250-55.256 of the Texas Administrative Code. The Commission, the Executive Director, the Petitioner, or affected persons may request a contested case hearing on this application. 30 TEX. ADMIN. CODE § 55.251(a). The Commission must evaluate the hearing requests and may take one of the following actions:

- (1) determine that the hearing requests do not meet the rule requirements and act on the application;

- (2) determine that the hearing requests do not meet the rule requirements and refer the application to a public meeting to develop public comment before acting on the application;
- (3) determine that the hearing requests meet the rule requirements and refer the application to the State Office of Administrative Hearings (“SOAH”) for a hearing; or
- (4) refer the hearing requests to SOAH for a hearing on whether the hearing requests meet the rule requirements.

30 TEX. ADMIN. CODE § 55.255(a).

The regulations provide that a hearing request made by an affected person must be in writing and must be filed with the Office of the Chief Clerk within the time provided in the Notice of District Petition. 30 TEX. ADMIN. CODE § 55.251(b) and (d). These two requirements are mandatory. The affected person’s hearing request must also substantially comply with the following:

- (1) give the name, address, and daytime telephone number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

30 TEX. ADMIN. CODE § 55.251(c).

An affected person’s personal justiciable interest must be related to a legal right, duty, privilege, power, or economic interest affected by the application belonging to the requestor and not an interest common to members of the general public. 30 TEX. ADMIN. CODE § 55.256(a). The regulations give the Commission flexibility to determine affected person status by considering any relevant factor, including the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TEX. ADMIN. CODE § 55.256(c).

VI. HEARING REQUESTS

A. Analysis of the City of Ennis (City) Hearing Request

1. Whether the City Complied with 30 TEX. ADMIN. CODE § 55.251(c)

The City of Ennis, through attorney Emily W. Rogers, submitted a timely request which contained a name, address, and phone number pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(1). The City requested a contested case hearing pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(3). The City also provided the TCEQ Internal Control Number as required in the notice and pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(4).

2. Whether the City is an Affected Person

Because it is undisputed that the proposed District lies wholly within the City's ETJ, the Executive Director recommends finding that the City of Ennis is an affected person. The issue of city consent is an interest that is protected by the law under which the application will be considered, and the issue of city consent contains a reasonable relationship between the interest claimed and the activity regulated. 30 TEX. ADMIN. CODE § 55.256(a)(1) and (3). Furthermore, the City clearly identified the City's statutory authority and interest in the issues

relevant to the application pursuant to 30 TEX. ADMIN. CODE § 55.256(c)(6) in its request.

3. Petitioning the City for Consent

The Petitioner filed a Petition for Consent with the City on September 17, 2020, and provided the TCEQ with a copy of the Petition for Consent and receipt of delivery with its Creation Petition. The Petitioner indicated that it did not receive any response from the City related to the Petition for Consent.

4. Petitioning the City for Service

Without city consent, landowners can pursue creation under the provisions of TEX. WATER CODE § 54.016(b) - (d). Under the Texas Water Code, if the city fails or refuses to grant consent within 90 days after receipt of a written request, the landowners in the area may petition the city to provide the land with the water and sewer services contemplated to be provided by the district. TEX. WATER CODE § 54.016(b); LOC. GOVT. CODE § 42.042(b). The requirements for making such a petition are set out in LOC. GOVT. CODE § 42.043. Under that section, before the petition can be circulated among voters and landowners, notice must be provided by posting a copy of the petition for 10 days in three public places in the area to be serviced and by publishing the notice once, in a newspaper of general circulation serving the area, before the 15th day before the date the petition is first circulated. LOC. GOVT. CODE § 42.043(c).

The Petitioner published Notice of the Petition for Water and Sanitary Sewer Service on December 27, 2020, in *The Ennis News*, a newspaper of general circulation within and around the District and provided the TCEQ with a copy of the Notice and affidavit of publication. On December 30, 2020, the Petitioner posted the Notice of Petition in three places convenient to the public within the boundaries of the Property sought to be included in the District and provided the TCEQ with a copy of the affidavit of posting. The Petitioner filed the Petition for Water and Sanitary Sewer Services with the City on January 12, 2021, and provided the TCEQ with a copy of the Petition for Services. The Petitioner

indicated that it did not receive any response from the City related to the Petition for Service.

5. Authorization for Creation by Failing to Execute a Contract

Under the Texas Water Code, if the landowners and the city fail to execute a “mutually agreeable contract” for the provisions of the requested services within 120 days after receipt of the petition, “the failure shall constitute authorization for the inclusion of the land in the district under the provisions of this section.” TEX. WATER CODE § 54.016(c); LOC. GOVT. CODE § 42.042(c). According to the Petitioner, the petition was filed with the City on January 12, 2021. Assuming this to be true, the 120-day period in which to execute a mutually agreeable contract would have ended on May 12, 2021.

If, as it appears, the City failed to enter a mutually agreeable contract during the 120-day time period, then the District would have authorization “to initiate proceedings to include the land within the district as otherwise provided by this Act.” TEX. WATER CODE § 54.016(c). By filing its application for the creation of Ellis County MUD FM 984 with the TCEQ on February 2, 2021, the Petitioner has initiated proceedings to include the land within the District as otherwise provided by TEX. WATER CODE § 54.016, even if the application was submitted before the 120-day period had begun.

6. If the Commission Finds that the Petitioner Complied with TEX. WATER CODE § 51.016(b) and (c), then it must make one of the following findings:

- a) whether the City has the reasonable ability to serve the proposed development at a reasonable cost to the landowner; or**
- b) whether the City failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to serve the proposed development at a reasonable cost to the landowner.**

Under TEX. WATER CODE § 54.016(d), if the City neither gives its consent nor executes a “mutually agreeable contract” to provide service to the area, “the

applicant may petition the commission for creation of the district or inclusion of the land in a district.”

TEX. WATER CODE § 54.016(d) goes on to state that “[t]he commission shall allow creation or inclusion of the land in a proposed district upon a finding that the city either does not have the reasonable ability to serve or has failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to serve the proposed development at a reasonable cost to the landowner.” Under this provision, the Commission is required to grant the creation of the District if it makes one above referenced and bolded findings.

With respect to the first of these findings, the City has not indicated whether or not it has the ability to serve the area. However, the TCEQ Technical Memorandum states on page 3 that there are no other sources which have the facilities or capacity to serve the proposed District. Because the City may be unable to serve water within the area of the proposed district, there is a fact question of its ability to serve the area at a reasonable price to the landowner.

Additionally, the Executive Director is without any evidence as to whether the City has failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to serve the proposed development at a reasonable cost to the landowner.

B. Analysis of Ellis County’s Hearing Request

1. Whether Ellis County Complied with 30 TEX. ADMIN. CODE § 55.251(c)

Ellis County, through attorney Emily W. Rogers, submitted a timely request which contained a name, address, and phone number pursuant to which contained a name, address, and phone number pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(1). Ellis County requested a contested case hearing pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(3). Ellis County also provided the TCEQ Internal Control Number as required in the notice and pursuant to 30 TEX. ADMIN. CODE § 55.251(c)(4).

2. Whether Ellis County is an Affected Person

Ellis County identified its statutory authority and interest in the issues relevant to the application pursuant to 30 TAC § 55.256(c)(6). Specifically, the County stated the Texas Water Code authorizes the County to provide TCEQ with its “findings, conclusions, and other information that the commissioners court thinks would assist the commission in making a final determination on the petition” (TEX. WATER CODE § 54.0161(b)(2)); and that TCEQ is then required to consider this information and opinion provided by the County. TEX. WATER CODE § 54.0161(c). Furthermore, it is undisputed that the proposed District lies within Ellis County.

VII. RECOMMENDATION

The Executive Director recommends that the Commission grant the hearing requests of the City of Ennis and Ellis County.

If the Commission chooses to deny the above hearing requests, then the Executive Director recommends that the creation petition be granted.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

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CERTIFICATE OF SERVICE

I certify that on December 21, 2021, the “Executive Director’s Response to Hearing Requests” for Docket Number 2021-1560-DIS was filed with the Texas Commission on Environmental Quality’s Office of the Chief Clerk.



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DOCKET NO. 2021-1560-DIS; INTERNAL CONTROL NO. D-02052021-015

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Attachment A

Ellis County Municipal Utility District FM 984

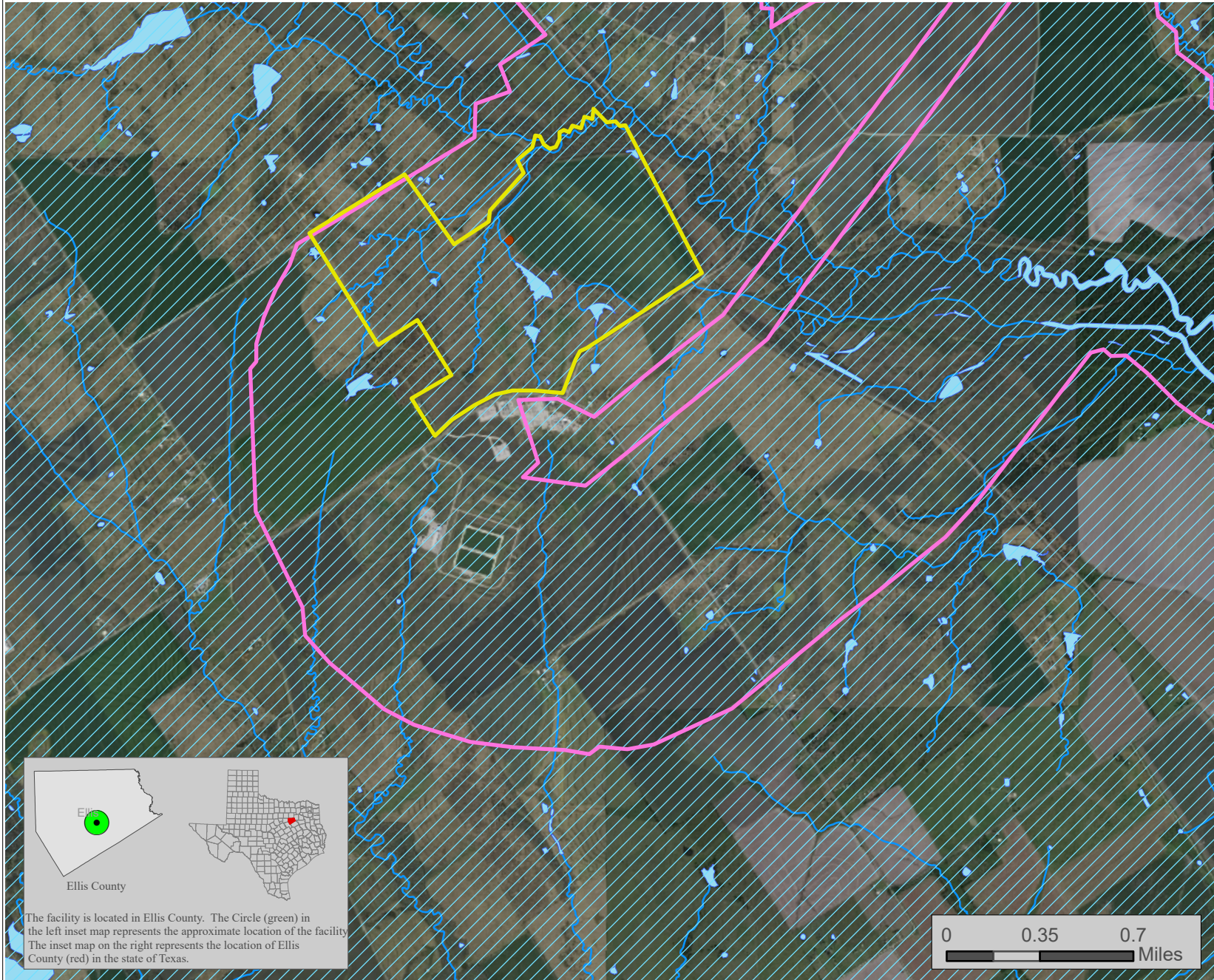
TCEQ Internal Control No. D-02052021-015

Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda

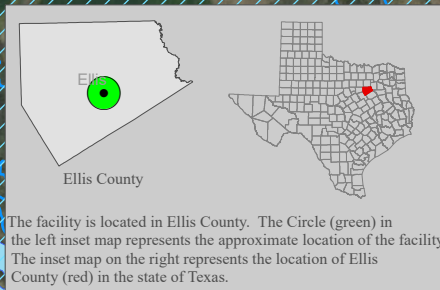


*Protecting Texas by
Reducing and
Preventing Pollution*

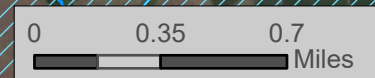
Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
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Date: 11/3/2021
CRF 0061207
Cartographer: ABanda



- City of Ennis ETJ
- Proposed MUD
- Ellis County



The facility is located in Ellis County. The Circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of Ellis County (red) in the state of Texas.



Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.